Bilmax, Inc., d/b/a Ellis Toyota *and* Guillermo DeLeon *and* Larry Darlington. Cases 31-CA-10756, 31-CA-10927, and 31-CA-11135

March 7, 1983

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND ZIMMERMAN

On July 30, 1982, Administrative Law Judge Gordon J. Myatt issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief[1] and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Bilmax, Inc., d/b/a Ellis Toyota, Colton, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT discharge employees for engaging in activities statutorily guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL NOT interrogate employees concerning their union attitudes or sympathies.

WE WILL NOT make the following threats to our employees:

That we will close the dealership if they are represented by a union;

That we will reduce their earnings by hiring additional employees;

That we will screen job applicants to ascertain their union sentiments;

That we will cause bodily harm to come to employees attempting to organize a union;

That we will discharge employees who support a union.

WE WILL NOT promise employees that if they ask for the return of their union authorization card and abandon their support for the Union their job assignments and earnings will be restored to the levels previously enjoyed.

WE WILL NOT reduce the job assignments and earnings of employees, because they have

[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

[2] We find no merit in Respondent's allegations of bias on the part of the Administrative Law Judge and lack of procedural due process, which assertedly stem from the Administrative Law Judge's credibility findings. There is no basis for finding that bias or partiality existed or due process was denied merely because the Administrative Law Judge resolved important factual conflicts in favor of those witnesses who testified on behalf of the General Counsel. As the Supreme Court has stated, "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." *N.L.R.B.* v. *Pittsburgh Steamship Company*, 337 U.S. 656 (1949). Moreover, it is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Chairman Miller does not adhere to the rationale expressed in *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980), and *Gossen Company, a Division of the United States Gypsum Company*, 254 NLRB 339 (1981). Accordingly, he would not find General Manager Farris' questioning of service department employees to be violative of the Act. In so finding, Chairman Miller notes that the questioning was directed solely at the employee-members of the Union's in-plant organizing committee and, admittedly, there were no threats of reprisal or promises of reward.

[3] We shall issue a new notice to provide that, in conformity with the recommended Order, Respondent will expunge from its records references to the termination of DeLeon and the constructive discharge of Darlington, and will notify each employee of such compliance, and that it will not use its unlawful conduct as a basis for any future personnel actions.

engaged in union activities, so as to adversely affect their working conditions in order to cause them to quit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under the Act.

WE WILL offer Guillermo DeLeon and Larry Darlington immediate and full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of earnings and benefits they may have suffered because of our discrimination against them, plus interest.

WE WILL expunge and remove from our records and files any reference to the termination of DeLeon and the constructive discharge of Darlington; and WE WILL write a letter to each of these employees informing him that we have complied with this provision and that our unlawful conduct will not be used as a basis for future personnel action against him.

BILMAX, INC., D/B/A ELLIS TOYOTA

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge: Upon the charge filed by Guillermo DeLeon in Case 31-CA-10756 and by Larry Darlington in Cases 31-CA-10927 and 31-CA-11135 the Regional Director for Regional Director for Region 31 issued several complaints. Finally, on July 8, 1981,[1] the Regional Director issued a second consolidated amended complaint and notice of hearing alleging that Bilmax, Inc., d/b/a Ellis Toyota (hereafter called Respondent), committed various violations of the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* (hereafter called the Act).

Although the allegations set forth in the consolidated complaint are interrelated, they involve separate and distinct events. It is alleged that, during the months of November and December 1980, Guillermo "Willy" DeLeon engaged in protected concerted activity at Respondent's dealership and, while so doing, was unlawfully interrogated by an agent and supervisor about his union sympathies. It is alleged further that an employee was informed by a supervisor in November that DeLeon would be discharged for engaging in such activity, and finally, that on December 4, 1980, DeLeon was discharged by Respondent because he engaged in activities protected by Section 7 of the Act.

It is also alleged in the consolidated complaint that Respondent's agents and supervisors unlawfully coerced employees in January and February 1981 by (1) threatening to discharge employees in order to discourage support for the Union seeking to represent them; (2) informing an employee that DeLeon was discharged because Respondent believed he would organize a union at the dealership; (3) telling employees that Respondent would close its dealership in order to avoid unionization; (4) informing employees that Respondent would hire a "hit man" to kill DeLeon because he was seeking to unionize the employees; (5) informing employees that Respondent would interrogate applicants for employment to ascertain their attitudes toward unions; (6) informing employees that Respondent would hire additional employees in order to dilute the earnings of current employees who worked on a commission basis; (7) asking an employee to revoke and seek the return of his union authorization card; and (8) withholding work from an employee known to be a supporter of the Union, thereby causing the employee to terminate his employment. Respondent filed an answer in which it admitted certain allegations of the complaint, denied others, and specifically denied the commission of any unfair labor practices.

The hearing was held in this consolidated matter in San Bernardino, California, on February 23, 24, and 25, 1982.[2] The parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issues in controversy. Briefs were submitted by the parties and have been duly considered.

Upon the entire record in this case, including my observation of the witnesses and their demeanor while testifying, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation with its office and principal place of business located in Colton, California. Respondent is engaged in the sales and servicing of new and used automobiles. In the course and conduct of its business operations, the Respondent annually purchases and receives goods and/or services valued in excess of $5,000 directly from suppliers located outside the State of California. From its business operations Respondent annually derives gross revenues in excess of $500,000.

On the basis of the above, I find that Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

General Truck Drivers, Warehousemen and Helpers Union, Local 467, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates herein refer to 1981 unless otherwise indicated.

[2] At the hearing, the General Counsel was granted permission to further amend the consolidated complaint by deleting certain substantive allegations and adding others.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

Respondent operates a Toyota automobile dealership. In addition to selling and servicing new Toyotas, Respondent sells and services all types of used automobiles, domestic and foreign, as well as recreation vehicles (RVs). During the time material to this case, Respondent's service department consisted of the following: the service manager, who was in charge of the entire service department; a service adviser, who wrote up customer repair and service orders; a service secretary, who worked in the service office and on occasion assisted the service adviser; and the line mechanics, who performed the work on the automobiles being serviced or repaired. The line mechanics were compensated solely on a commission basis and the amount of commission earned on each job varied with the category of work being performed. For example, warranty work was calculated on a flat rate basis set by the manufacturer. This was the least lucrative in terms of the commission for the mechanics. The other category of work was described as "customer paid" and consisted of services and repairs on vehicles not under warranty. This work was billed at approximately 1.5 times the flat or warranty rate and thereby earned the mechanic performing such work a larger commission. Although warranty work provided the mechanic with a lower rate of return for their effort, they were all assigned and expected to perform work in both categories.

B. *DeLeon's Opposition to Working the Service Clinic Without Compensation*

Prior to his discharge DeLeon was a line mechanic for Respondent. He had been employed by Respondent on several different occasions before the term of employment under consideration here. DeLeon testified that, in early October 1980, the service manager, John Lewis, called the mechanics together in the service area and informed them Respondent intended to hold a free service clinic the following month for owners of Toyota vehicles.[3] The clinic was to be held on consecutive evenings on a Thursday and Friday and during the day on the following Saturday. According to the testimony of DeLeon, he asked if the mechanics would be paid by management for participating in the clinic. Lewis stated he would see what he could do about the matter of pay, "but not to count on it." DeLeon further testified that, approximately 2 to 3 weeks before the clinic was scheduled to be held, he spoke with the other mechanics in a group. Lewis was present at this meeting. According to DeLeon, he again asked Lewis if the mechanics would be paid for working the clinic. Lewis said no and that management indicated "it was out of the question." DeLeon then replied that it was unfair and told the mechanics that, if they stuck together, they could compel management to pay them for working the clinic. DeLeon testified that several other mechanics voiced similar objections and one mechanic, Anthony Juliano, objected to the fact that he was *told* rather than *asked* to work without pay. DeLeon stated Lewis became red in the face and raised his voice. Lewis said there was no union at the dealership. DeLeon then asked what would happen if none of the mechanics showed up? Lewis replied that he (Lewis) would have to work the clinic himself. According to DeLeon, at no time during this meeting or the prior meeting did Lewis state that the mechanics' participation in the clinic was voluntary.

Gregory Highton, formerly employed as a mechanic by Respondent from May 1979 to May 1981, testified regarding the second meeting between the mechanics and Lewis over the issue of the service clinic.[4] According to Highton, DeLeon urged the employees at the meeting to stick together to compel management to pay them for working the service clinic. He stated Lewis told the employees that working the clinic would be voluntary on their part, but implied it would be in their interest to do so. Lewis said, according to the testimony of Highton, that any mechanic who failed to show up for the clinic would not be given any of the work generated by it.

Darlington, the other Charging Party in this case, also testified regarding the second meeting between the employees and Lewis. According to Darlington, when DeLeon urged that the employees ban together to demand pay for working the service clinic, Lewis stated, "We don't have a union here." He also recalled that Lewis told the employees their participation in the clinic was not mandatory and, if he had to operate the clinic alone, he would.

Juliano testified regarding both meetings between the employees and Lewis concerning the service clinic. Contrary to DeLeon's testimony, Juliano stated the initial meeting occurred sometime in early September 1980.[5] He said the employees questioned Lewis about being paid for working the clinic and Lewis indicated he would speak to higher management about their request. Lewis told the employees their participation would be voluntary and, according to Juliano, they disagreed with him. At the second meeting, DeLeon asked if the employees would receive pay for working the clinic and Lewis stated they would not. He was asked what would happen if the mechanics refused to work the clinic and Lewis replied that he would do it himself. Juliano stated that Lewis did not mention anything about there not being a union in the shop. According to Juliano, he also spoke up during the meeting. He told Lewis he would speak for himself and that, while he would work the clinic, he complained that management had not given the employees enough notice prior to scheduling the clinic.

[3] The service clinic was a promotional device used by Respondent to generate service and repair work for its shop. Solicitations were made by mail to owners of Toyota vehicles offering free diagnostic inspection of their automobiles. Although the owners of the vehicles inspected at the service clinic were under no obligation to have any repairs made at Respondent's shop, the obvious hope was that a majority, if not all, would do so. (See Resp. Exh. 13.) Under Respondent's practice, the mechanics participating in the clinic were not paid any wages but were expected to benefit from the increase in the resulting repair work.

[4] Highton stated that he quit his job with Respondent because he felt he was not receiving the amount of work he had been getting prior to the union campaign in early 1981, and because of the "conflict" between the employees and management.

[5] Juliano left Respondent's employment on October 15, 1980.

Lewis testified as a witness for Respondent, although he was no longer employed at the dealership at the time of the hearing.[6] He stated that the service clinic was held in September 1980,[7] and was the second such clinic run by Respondent during that year. According to Lewis, he first informed the mechanics about the clinic 2 to 3 weeks prior to the time it was scheduled to be held. DeLeon and Juliano asked if the mechanics would be paid and he stated he would inquire about it. He explained to the employees that their participation was voluntary. Lewis later spoke to the general manager, Gary Farris, about the mechanics' request to be paid for working in the clinic. He was told the employees would not receive any pay. Lewis testified that DeLeon initiated the second meeting with the employees by advising him that the mechanics wanted to talk to him regarding the clinic. When he met with the employees, DeLeon repeated the demand that the employees be paid for working the clinic. Lewis advised the employees that they would not be paid and that it was not mandatory that they participate in the clinic. He stated that DeLeon urged the employees to stick together so they could compel management to pay them. Lewis admitted he raised his voice at this point but denied he said there was no union at the dealership. He confirmed that, while Juliano complained of the short notice to the employees, he stated he would work the clinic. Lewis acknowledged he told the employees he would work the clinic himself, if none of the mechanics showed up. After the second meeting with the employees, Lewis went to Farris and informed him of the position taken by DeLeon regarding pay for working the clinic. Farris told Lewis he would speak to the employee.

DeLeon testified he was called into Farris' office that evening after work. According to DeLeon, Farris stated Lewis had reported that the employee was organizing some type of union activity and complaining about the clinic. DeLeon replied that, if there were a union in the shop, the mechanics would be paid for working the clinic. DeLeon testified that Farris then said unions were no good and cited the situation at Kaiser Steel as an example. He told the employee "the Union was putting that company under." Farris said, according to DeLeon, that he "didn't want any of that union stuff" and, if the employee wanted a union, he could go somewhere else. DeLeon was unable to recall whether Farris told him the mechanics' participation in the clinic was voluntary and Respondent could not force them to work, since they would not receive any pay.

Farris admitted sending for DeLeon after Lewis reported the employee's opposition to working in the clinic without being paid. He stated he told DeLeon that the announcements (auto-grams) were mailed out at a cost of $3,000 to $5,000 and this was the reason the mechanics were expected to volunteer their services for the clinic.[8] Farris denied that he told the employee that Lewis reported he was trying to organize a union in the shop and stated there was no mention of a union during his conversation with DeLeon. He further stated he heard nothing about a union in the shop until after DeLeon was discharged in December.

DeLeon testified that, a few days after the second meeting about the service clinic, he spoke with Lewis in the customer parking area. According to DeLeon, Lewis stated that since DeLeon was the "shop steward" he did not have to work the clinic and there would be no reprisals taken against him.[9] The clinic was held as scheduled. DeLeon worked the clinic on Thursday and Friday but did not appear on Saturday. The record indicates that no disciplinary action was taken against DeLeon for failing to work on the final day of the clinic.

Darlington testified that sometime in November 1980 he had a conversation with Farris in which DeLeon was mentioned. Darlington went into Farris' office to complain about not receiving the Mechanic-of-the-Month award.[10] During the course of the discussion, Farris complained that DeLeon had made himself a "mouthpiece" for the mechanics regarding the service clinics. According to Darlington, Farris stated that he did not need that "damn Willy."

C. DeLeon's Opposition to Working Wednesday Evenings

In October 1980, Farris decided that the service department would work an evening shift on Wednesdays. Although Lewis initially opposed this idea because he felt there would not be enough work to warrant remaining open 1 night a week, he was directed by Farris to implement the program. Lewis testified that he first required all the mechanics to remain on Wednesday evenings and, depending upon the volume of work, released those that were not needed. He later developed a scheduled which required at least two mechanics to work late on alternate Wednesdays.

According to DeLeon, he spoke with the other mechanics and they were opposed to working late on Wednesday evenings. DeLeon testified he went to Lewis and complained that working late 1 night a week was unfair to the mechanics, since there was not enough work and they were only paid by commissions. Despite these protests, the Wednesday evening shift was instituted as scheduled.

DeLeon further testified that, on December 3, he was told by Lewis he would have to work late that evening. Although he had worked the evening shift 2 weeks prior to this, DeLeon felt it was not his turn to work late again. The conversation between DeLeon and Lewis took place in the area of the service bays in the shop. DeLeon acknowledged during his testimony that the dis-

[6] Lewis left Respondent's employ to accept a higher paying position as service manager for a Volkswagen dealership in April 1981.

[7] The mail-outs (auto-gram) announcing the clinic show that it was held on September 25, 26, and 27, 1980. (Resp. Exh. 13.)

[8] Respondent hired an independent agency to ascertain the names and addresses of all Toyota owners in the area and mail the auto-grams to them announcing the clinic.

[9] DeLeon stated that Lewis referred to him as the shop steward on several occasions. In one instance, a mechanic brought a problem to Lewis and Lewis told him to discuss it with the shop steward (referring to DeLeon).

[10] In the fall of 1980 Respondent had initiated a program whereby it issued the top mechanic for the month an award. Darlington was the recipient of the award for the months of September and October.

cussion became quite loud. He told Lewis that working on Wednesday nights "sucks." DeLeon denied that any customers were in the vicinity at the time he made this comment to Lewis.

The next morning when DeLeon reported to work, he went into the service office to receive his work aasignment and was told by Lewis that he was terminated. According to DeLeon, Lewis said, "I can't take it any more." Lewis stated that DeLeon was causing too many problems between him and the mechanics. DeLeon replied, "Fine," and said he did not want to work for anyone he did not respect. DeLeon admitted that his voice was raised during this discussion in the service office and he told Lewis that he was "spineless."

While the testimony of Respondent's witnesses tends to corroborate the basic account of the events given by DeLeon, there are significant differences. First, Virgil Schiess, one of the mechanics, testified that the discussion between DeLeon and Lewis on December 3 took place just outside the service bay where he was working.[11] According to Schiess, DeLeon complained to Lewis about having to work that evening and yelled that working Wednesday nights "sucked."[12] He stated that DeLeon was angry and, when the employee returned to his service bay, he slammed the hood down on the car in the bay with such force that Schiess thought he had damaged the headlights of the vehicle. He further testified that DeLeon also threw a tool at the workbench in the stall.

Jolyne Flinchbaugh, the service secretary, testified she was in the service office on December 4 when Lewis had a conversation with DeLeon. Although Flinchbaugh was only a few feet away from Lewis and DeLeon, she stated she did not hear Lewis tell DeLeon he was fired or that he was causing trouble between Lewis and the mechanics. However, Flinchbaugh testified she heard DeLeon tell Lewis he was going to get Lewis' job because Lewis spent too much time on personal business. She also stated DeLeon told Lewis that "his music sucked."

Lewis testified that on December 3 he was checking to make certain that the mechanics scheduled to work that evening were going to remain. When he approached DeLeon, the employee said he had to attend to some personal business that evening. Lewis replied that, if DeLeon could get someone to work in his place, he could leave. If not, he would have to remain. It was then, according to Lewis, that DeLeon said in a loud voice, "Working late on Wednesdays sucks." Although Lewis acknowledged that there were no customers in the immediate area of the service bays, he noted that some customers were present in the service driveway and he considered them to be within hearing range of the conversation. Lewis stated that the next morning he instructed the service adviser (Burrow) not to assign any work to DeLeon, and he then reported the Wednesday evening incident to Farris. According to Lewis, Farris said that DeLeon should be terminated because he had been guilty of past violations of company policies. Lewis returned to the service office and spoke to DeLeon.[13] Lewis told DeLeon he was fired because of previous violations of company policy and because he yelled at Lewis and used profanity within the hearing of customers the prior evening. At this point, according to Lewis, DeLeon started yelling and said he did not want to work for someone he did not respect. He also accused Lewis of being spineless. DeLeon told Lewis that he would get him replaced by a "good service manager." He also made the comment to Lewis that "your music stinks."[14]

Lewis testified that, other than the incident on December 3, the most immediate past violation of company policy by DeLeon occurred on December 1. DeLeon's wife called on that morning and spoke to the service secretary. She told Flinchbaugh that DeLeon would be late for work because he did not have any transportation. At approximately 1 p.m. that same day, DeLeon's wife called again and told Flinchbaugh that DeLeon would not be in at all because he was ill. According to Lewis, the shop policy required employees to contact him directly when they did not intend to show up for work. He stated that he spoke to DeLeon about the matter the next day but did not issue a written reprimand to the employee for this breach of the shop rules.

DeLeon admitted that he had been warned for tardiness in May 1980, and Respondent's records show that he had received written reprimands in July and August of the same year. The July reprimand involved the unauthorized use of a customer's vehicle to go to a nearby McDonald's on July 7. (Resp. Exh. 3.) The written reprimand given to DeLeon on August 6 involved two separate incidents. He was charged with parking his automobile the previous day behind the used cars on the west end of the company's property without securing the requisite permission to do so. According to Respondent's written shop rules (shop bulletins), employees parking on company property had to secure written permission from the service manager. The second incident cited in this written reprimand indicated that the previous day DeLeon was clocked out from 12:05 p.m. until 2 p.m. during his lunch hour. Under the written shop rules his lunch hour was scheduled from noon until 1 p.m. (See Resp. Exh. 4.)

After his discharge, DeLeon filed for benefits with the state unemployment agency. Respondent contested DeLeon's claim on the grounds that the employee was discharged for speaking disrespectfully to a supervisor in a loud voice in front of customers and that this was the latest of a series of incidents of unsatisfactory conduct. (Resp. Exh. 14.)[15]

[11] Schiess was hired on November 14, 1980, and is currently employed by Respondent.

[12] All witnesses agreed that the use of profanity was a common occurrence in the service shop.

[13] According to the testimony of Lewis, Flinchbaugh was only 3 or 4 feet away from him at the time.

[14] When questioned about the reference to Lewis' music, DeLeon testified that, prior to their differences, he and Lewis used to visit each other and listen to music. However, DeLeon stated he did not make mention of Lewis' music at the time he was told he was terminated. He testified that he returned to the dealership several days later to pick up his final paycheck and it was then that he expressed his sentiments about the quality of Lewis' music.

[15] The unemployment compensation claim determination was admitted into evidence solely to establish the position taken by Respondent regard-

Continued

D. *The Union Activity and Incidents Following the Discharge of DeLeon*

1. DeLeon organizes the employees for the Union

Several days after his discharge, DeLeon returned to the service department and persuaded the mechanics to sign authorization cards for the Union. On December 15, the Union sent a letter to Respondent stating it represented the employees and demanded recognition as their bargaining representative. The letter listed eight employees by name and identified them as "in-plant committeemen." (See G.C. Exh. 2.)[16]

2. Farris meets with the employees regarding the Union

Darlington (one of the employees named in the letter) testified that, a week or so after the Union sent the demand letter, DeLeon came to the service department and was observed by Farris. Shortly thereafter, Farris called a meeting of the service department employees in his office. He told them he felt hurt because they wanted a union and he sought to find out why the employees felt it was necessary to be represented by a union. He asked the employees if money was the problem and they indicated it was not. Darlington told Farris at this meeting that he wanted someone between him and management. The employees and Farris also discussed job security.[17]

3. Schiess informs management of his change of heart

Virgil Schiess testified that he had some misgivings after signing the authorization card for the Union.[18] He went to Lewis and said that he thought he had made a mistake by signing the authorization card. According to Schiess, Lewis suggested it would be best for him to write a letter to the Union asking for the return of his authorization card. Schiess composed the revocation letter and showed it to Lewis. He stated Lewis kept the letter for several hours and then returned it to him stating that it was all right for the employee to send it. Schiess put the letter in the glove compartment of his automobile with the intention of mailing it. However, he forgot it and never sent the letter to the Union.

Lewis confirmed that Schiess came to him and said that he had signed a union card for DeLeon but now wanted to retract his authorization. Lewis told the employee he should write a letter to the Union stating he did not want to be represented by it and asking for the return of his card. According to Lewis, several days later Schiess showed him a letter he had written to the Union. Lewis took the letter to Farris who read it. Farris concluded that it was sufficient to revoke the employee's authorization card and instructed Lewis to return the letter to Schiess for mailing.

4. The dismissal of the Union's first petition

Farris testified that, when he received the request for financial information regarding the representation petition from the Regional Office, he thought that it related only to the service department. He submitted figures to the Regional Office which showed that Respondent did not satisfy the Board's retail standard for jurisdiction. Based on this information, the Regional Director issued a letter dismissing the petition on January 15, 1981. (G.C. Exh. 4.) The Union filed a second representation petition for an election in the same unit on February 3, 1981. (G.C. Exh. 5.) This time, the total volume of business performed by Respondent's dealership was taken into account and the Regional Office asserted jurisdiction over the matter.

5. The conversation between Lewis and employee Highton

As noted, Gregory Highton was a mechanic employed by Respondent from May 1979 until he quit in May 1981. Highton testified that, sometime in January 1981, Lewis came over to his service stall and spoke to him about the Union. Lewis mentioned that Highton's name was listed in the Union's demand letter. They left the stall and walked out to the parking lot. Highton stated that Lewis said he should not get involved with the Union. According to Highton, Lewis said he liked the employee but, if he continued to be involved with the Union, things could get out of Lewis' control and there was nothing he could do about it. Highton further testified that Lewis stated he told Farris that DeLeon mentioned organizing a union during the meetings held with the employees about the service clinics, and Farris said DeLeon was a troublemaker who should be fired because he would organize a union. During this conversation, according to Highton, Lewis said DeLeon could wind up in a gutter. He told Highton that Ellis had a lot of money and could hire a "hit man" to kill DeLeon. Highton testified that Lewis stated that anyone working in the service department who was suspected of trying to organize a union would not be working there in a year. He further testified that Lewis indicated management would interview all job applicants to determine whether they were for or against unions. Lewis also said that any employee who went into the general manager's office of any dealership and mentioned the word "union" would be fired on the spot. Lewis said that, if the Union represented the employees, Ellis would close the dealership and move.

Lewis admitted having a conversation with Highton about his involvement with the Union. He testified that he informed the employee he had seen the demand letter stating Highton was one of the in-plant committeemen. Lewis stated he wanted to make sure the employee knew what he was getting involved with. According to Lewis, Highton said he was not that interested in the Union but was using it "to get back at old man Ellis." Lewis denied

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ing the asserted reason for the discharge of DeLeon. The determination of the claim by the state agency is not binding in this proceeding and is accorded no weight in this decision.

[16] The Union filed a representation petition with the Board's Regional Office on December 17 requesting an election in the following unit:

> All Counter Men, Service Technicians, Mechanics, Lot Persons, Parts Men and Recreation Vehicle Technicians.

[17] Darlington's testimony regarding this meeting was corroborated by Farris.

[18] Schiess was also named in the demand letter as one of the in-plant committeemen.

telling Highton that DeLeon would wind up in a gutter or that Ellis would hire a hit man to take care of DeLeon. He also denied stating Ellis would close the dealership if the Union represented the employees or that management would question job applicants to determine if they were union supporters.

6. The event relating to Darlington

Darlington testified he was active on behalf of the Union. He stated that, after the first representation petition was dismissed, he signed another authorization card for the Union and solicited signatures from employees on additional cards to support the petition filed in February. He also put union stickers on his toolbox in the shop.[19] Darlington was the observer for the Union during the election which was held on March 27, 1981.

Darlington testified to several conversations he had with members of management regarding the Union. He recalled that in mid-January he spoke with Dan Patterson, Sr., the used-car manager, in the parking lot. Darlington complained to Patterson that he was not getting as much work because of the "union deal." Patterson stated, according to Darlington, that the employee had better get out of the Union because, anyone who did not, would be fired.[20]

Darlington further testified that on February 2 an automobile he had repaired was returned to the shop. The complaint was that the ignition screw was missing from the distributor. Lewis questioned Darlington about his work on the whole and Patterson was present during the discussion.[21] Darlington told Lewis he had no knowledge of how the screw came to be missing. As Lewis walked away, Darlington told Patterson in a low voice that he knew what had occurred. He intimated that the car had been tampered with after he completed his work on it. Patterson went to the service office and told Lewis about Darlington's comments. Lewis then summoned the employee into his office. Lewis asked the employee about his remarks to Patterson. Darlington then stated he felt the ignition screw had been removed after he worked on the automobile because of his activities on behalf of the Union. According to Darlington, Lewis became red in the face and walked out of the office.

On February 4, Darlington went to the service office to speak with Lewis. He told the service manager he was sorry their relationship had deteriorated. According to Darlington, Lewis stated he was angry because he felt Darlington implied that he (Lewis) had removed the ignition screw from the automobile. He also told Darlington that Patterson wanted to know why he had not fired the employee as a result of the incident. The conversation between Lewis and Darlington continued from the office to Darlington's service stall. Darlington testified that Lewis said there was no way the Union would be allowed to come into the dealership. Lewis stated, according to Darlington, that Ellis would transfer the title and close the doors for a few months. He also stated that management would hire more mechanics and thereby reduce the amount of work and commissions available to all the mechanics. Darlington asked why Lewis was "sitting" on him, since Schiess was also a supporter of the Union. At this point Darlington also complained that the hours of billable work assigned to him had decreased while the hours "flagged" by Schiess had remained the same.[22] Darlington testified that Lewis replied that Schiess had asked the Union for the return of his authorization card and, if Darlington did the same, everything would be all right. Lewis further stated, according to Darlington, that if the employee asked for the return of his authorization card, Highton would do likewise. He said there was no need to bother about Galbadon, because he was a "hot headed little Latin."

Darlington also testified that Lewis stated during this conversation that Ellis was rich and powerful and indicated the employees could not expect to antagonize a man like that and get away with it. According to Darlington, Lewis said DeLeon was lucky he was not in a gutter, and that it was easy to cause DeLeon to have a heart attack by giving him a shot of adrenalin under his arm. Darlington further testified that Lewis said the "Union matter was going to get bloody before it was over." He told the employee that Respondent intended to test the "fine" by firing some employee and that Darlington might be the one selected. When questioned about what the fine involved, Darlington said Lewis indicated there was a $5,000 fine for firing an employee under these circumstances (presumably for engaging in union activity), and Respondent intended to test that fine.

Darlington stated that approximately a week later he was in an automobile with Lewis, and Lewis wanted to know what he had decided to do about the Union. Darlington expressed distrust of Farris and Lewis assured the employee that nothing would happen to him. According to Darlington, Lewis asked if he were looking for another job. Darlington admitted that he was and wanted to know if Respondent's officials had notified other dealers about his union activities.

Darlington also testified that, after he was named in the Union's demand letter of December 1980 as one of the in-plant committeemen, the amount of work assigned to him sharply decreased; and the work he did receive was less lucrative than the work assigned to him before his involvement with the Union. According to Darlington, this change in his work assignments resulted in his receiving a lot of used car and warranty work. Since the used cars usually involved American-made automobiles rather than Toyotas, Darlington stated it took him longer

[19] According to Darlington, Victor Galbadon and Highton also displayed union stickers on their toolboxes.

[20] Patterson denied having any conversation with Darlington in which the Union was mentioned. Darlington gave four affidavits during the investigation of the charges in these cases, and admitted that he made no reference in any of the sworn statements to any comments by Patterson about the Union.

[21] Patterson testified he sold the used car to a friend and, when it was returned because of the ignition problem, he brought the matter to the attention of Lewis and Darlington. According to Patterson, a pencil was stuck in the area where the ignition screw should have been. He stated the absence of an ignition screw could have resulted in a fire under the hood.

[22] The term "flagged" was used in the shop to designate the number of billable hours each mechanic worked.

to complete each job; thereby reducing the amount of his earnings. His complaint about the warranty work was that it paid a lower rate than the customer-paid work. The General Counsel introduced schedules, provided by Respondent, into evidence which showed the number of hours "flagged" and the gross pay received by each mechanic for each pay period from October 15, 1980, to June 30, 1981. (G.C. Exhs. 6(a)-(f).)[23] The exhibits show that Darlington flagged the highest number of hours (and thus received the greatest amount of wages) of all the mechanics for the pay periods ending October 15, 1980, to December 15, 1980. After that date, Darlington's hours dropped substantially. The following is abstracted from the summary compiled by the General Counsel and shows the comparison of hours for each of the mechanics after December 15, 1980:

DATE	*SCHIESS*	*PAYNE*	*DAR-LINGTON*	*HIGHTON*	*GABAL-DON*
12/31/80	104.1	*-	95.9	69.4	68.0
1/15/81	123.0	-	81.5	83.7	96.0
1/31/81	125.0	139.5	101.9	90.9	76.9
2/13/81	92.6	139.8	101.2	77.6	74.9
2/26/81	99.0	92.0	58.6	57.4	50.7
3/12/81	92.8	105.6	92.8	86.8	74.3
3/30/81	102.6	148.3	99.5	103.2	73.2
4/14/81	132.0	153.0	**57.0	99.9	90.8
4/30/81	119.4	125.4	61.6	56.4	62.8

* - Payne was not hired by the Respondent until mid-January 1981.
** - Includes the period Darlington was placed on suspension for 2 weeks.

Darlington admitted on cross-examination that he did not like to do "under the dash" work because he did not like to work in cramped spaces. He also admitted he preferred "clean work" such as tuneups and normal checkups[24] and that he did not particularly care for customer-paid work which required diagnosing a problem to ascertain what was wrong with a vehicle. Darlington maintained, however, that despite his preferences regarding the type of work he wanted to do, he worked on every vehicle assigned to him with two possible exceptions. First, a Ford station wagon owned by the wife of Respondent's owner was brought in for repair in June 1980. The repair order (Resp. Exh. 8) showed that it was originally assigned to another mechanic. The job was subsequently reassigned to Darlington. He testified that he initially refused the job because it was shop policy that a mechanic did not work on jobs assigned to other mechanics. Darlington ultimately did the work on the Ellis vehicle.

The second occasion Darlington refused a repair assignment was on January 8, 1981. A customer named Lowe brought his Toyota to the shop complaining about a noise in the drive train. Schiess originally worked on the automobile but apparently did not solve the problem. On January 8, a field representative from Toyota inspected the Lowe vehicle and authorized replacement of the differential. Although Schiess had previously worked on the car, it was assigned to Darlington. He refused the assignment on the ground that under the shop policy the automobile should have been given to the mechanic who first worked on it. The job was eventually assigned to Gabaldon. On January 12, Respondent promulgated a new shop rule (Shop Bulletin 4) whereby any refusal of work by a mechanic became grounds for reprimand and/or dismissal. Lewis issued a written reprimand to Darlington on January 14 for his refusal to work on the Lowe vehicle.[25]

Darlington stated that, when he complained to Lewis about the lack of job assignments in 1981, Lewis said that Burroughs, the service adviser, was responsible for dispatching the repair orders to the mechanics. Darlington further testified that, when he voiced his complaints to Burroughs, she told him the service manager was responsible for dispatching the work. Darlington estimated that prior to December 15, 1980, approximately 80 percent of his time in the shop was spent performing mechanics' duties. After that date, according to Darlington, only 35 to 40 percent of his time was devoted to mechanics' duties. He attributed the decline in his work to the failure of the service office to assign him any jobs.

On March 27, Darlington worked on the brakes of a customer's automobile. The customer called the service office on March 30 and complained that she was afraid to drive the car because the brakes were faulty. Darlington was dispatched to where the customer had parked the automobile and checked its condition. He found the car to be unsafe and it was towed to the dealership. It was then determined that the caliper mount bolts were missing from the left front brake. On April 1, Darlington was given a written reprimand for having performed faulty work on the brakes (Resp. Exh. 10) and, on April 2, he was suspended for 2 weeks beginning April 3 (Resp. Exh. 11).[26] While on suspension, Darlington was issued another written reprimand on April 6 regarding a comeback on an air-conditioning system which he installed in a truck in November 1980. The reprimand accused Darlington of leaving the "O" ring seals off the refrigerant hoses and failing to secure several brackets under the dash when installing the air-conditioning in the truck.[27]

After his suspension was completed, Darlington returned to work but asserted he still did not receive job assignments from the service office. On May 1, Darlington went to Burroughs and notified her that his uniforms were all turned in and that he quit.[28]

Respondent presented several witnesses to refute the testimony of Darlington. Burroughs testified that as the service adviser she wrote up the repair orders and logged them in on a daily worksheet. While she was re-

[23] The General Counsel consolidated the information contained on these schedules into a single summary attached to her brief as "Appendix A."

[24] Lewis testified this was the typical attitude of all mechanics.

[25] See Resp. Exh. 7. Darlington testified Lewis subsequently told him the written reprimand did not count since the shop bulletin was issued after his refusal to do the job.

[26] Darlington filed an unfair labor practice charge alleging that his suspension was due to his union activity. This charge was later dismissed by the Regional Director.

[27] Darlington testified he followed normal procedures in installing the air-conditioning system. He asserted he ran checks which would have revealed any leaks had the "O" rings been missing at the time.

[28] Lewis had left Respondent's employ several weeks prior to the time Darlington quit.

sponsible for determining which mechanic was available for the next job assignment, she stated the actual assignments were made by Lewis.[29] According to Burroughs, Darlington did not like work which involved diagnosing a problem with a vehicle, nor did he like to do warranty work or work on smog devices.[30] Burroughs testified that Darlington refused job assignments on 5 to 10 different occasions. When pressed for specifics, she said he refused smog work three or four times. However, she admitted that these refusals occurred prior to January 1981. She also said that he refused used-car work "on occasion" but she was unable to fix a precise time as to when these refusals occurred. Burroughs specifically mentioned Darlington's refusal to work on the the Lowe vehicle in January and a refusal to work on a "Funder Bus" in February.[31] Burroughs acknowledged that, after December 15, the number of hours flagged by Darlington dropped substantially. She stated Darlington and Highton frequently played chess during the day to pass the time.

Burroughs also recalled that, sometime in March 1981, Darlington spoke to Lewis about the small amount of customer-paid work being assigned to him. According to Burroughs, Darlington told Lewis that if he (Darlington) did not get any more customer-paid work, he was going to sue Lewis. Lewis asked if that was a threat and Darlington replied it was a promise.

Payne testified that, while his service stall was not in the same area as that of Darlington, he had occasion to observe Darlington each day. According to Payne, he observed Darlington refuse work assigned to him at least once every 2 to 3 days. He stated that Darlington consistently refused warranty work or work that required diagnosing a complaint about a particular vehicle. He further stated that Darlington often played chess when work was available for him. Payne made it clear that it was his belief that Darlington was purposely refusing work. According to Payne, Darlington merely had to go into the service office and get a job assignment. However, Payne admitted that he had no knowledge of whether Darlington had been into the office to ask for assignments and had been refused.

Regarding warranty work, Payne indicated that it was only a small portion of the work performed in the shop. According to Payne, he did more warranty work than any other mechanic in the shop because he was a fast worker. He further testified that Darlington complained to him about not receiving enough customer-paid work. Payne replied that Darlington turned down a lot of work. He stated that Darlington than said he was going to sue Respondent for backpay.[32]

The testimony of Schiess was similar to that of Payne. Schiess stated that Darlington refused job assignments at least two to three times a week and only wanted to work on certain types of cars. According to Schiess, he had observed Darlington come into the repair office, look at a repair order, and then refuse the work by laying the repair order back on the desk and walking out of the service office. Schiess also indicated that, shortly before Darlington quit on May 1, he made the statement that "he didn't give a shit about not working because he was going to sue the Respondent and get his money anyway."

Lewis, the former service manager, testified in detail regarding the matters raised by Darlington. Concerning the missing ignition screw incident on February 2, Lewis stated that after his conversation with Darlington and Patterson in the parking lot, Patterson came in and reported that Darlington asserted the screw had been deliberately removed. Lewis called Darlington into his office and he testified that Darlington claimed the automobile was sabotaged because of his union activities. Several days later, according to Lewis, Darlington came into the office and asked if Lewis were "aggravated" with him. Lewis admitted he was because of Darlington's accusation that the automobile had been sabotaged, and he told Darlington that Patterson wanted to know why he had not fired the employee. At this point, according to Lewis, Darlington stated that he felt Farris was out to get him because of his involvement with the Union. Lewis suggested to the employee that he go directly to Farris and discuss any differences they might have.

Lewis denied telling Darlington during this conversation that Ellis would shut the doors before he allowed the Union to come in and represent the employees. He also denied stating that Respondent would hire more mechanics in order to reduce the earnings of the employees if the Union became their representative. He denied telling Darlington that DeLeon would be found in a gutter after receiving an injection of adrenalin in his arm. Lewis also stated that Darlington did not ask during this discussion why Schiess received more customer-paid work than he did. He further denied telling Darlington that Schiess had revoked his union authorization card and, if Darlington did the same, he would receive more work. Lewis also denied telling Darlington that, if he asked for the return of his union authorization card, Highton would do likewise. Finally, Lewis denied telling Darlington that Respondent would fire some employee in order to test the $5,000 fine. Lewis stated that he did not have any knowledge of a fine being imposed for firing an employee.

Regarding the work assigned to Darlington, Lewis testified that the repair orders were logged in by the service adviser in the order that they came into the shop, and each job was assigned to the first mechanic available at the time. Contrary to Burroughs, Lewis testified that the service adviser made the majority of the work assignments and, when she was not available, the service secretary performed this duty. Lewis testified that only ap-

[29] Burroughs testified that Lewis made the work assignments about 90 percent of the time and that she only did so in his absence, or when he was not available.

[30] Burroughs said that Darlington was certified by the State to work on smog devices, but she did not know the particular areas in which he was certified. Prior to January 1981, Respondent subcontracted out most of the smog work. In mid-January Payne, who worked for the smog subcontractor, was hired by Respondent and all the work on smog devices was assigned to him.

[31] Darlington testified he was *asked* if he wanted to work on the Funder Bus, rather than being assigned to the job, and he declined.

[32] During the course of his testimony Payne acknowledged that he was opposed to unionization of the employees.

proximately 5 percent of his time was devoted to making job assignments to the mechanics.

Although he was aware that Darlington was the most productive line mechanic during the months of September, October, and November in 1980, Lewis denied any knowledge of a decrease in the amount of work being assigned to Darlington during the first 4 months in 1981. However, he was also aware of the fact that Payne had replaced Darlington as the most productive mechanic in the shop during this early period in 1981. According to Lewis, Darlington was not given any more warranty or used car work than any other mechanic in the shop. He further testified that the warranty work performed by the mechanics only amounted to about 10 percent of the total volume of work performed in the shop. Lewis also stated that on one occasion, in late December or early January, he saw Darlington asleep on the floor in his service stall. Lewis did not issue a written reprimand to Darlington but testified that he gave the employee a verbal warning. Lewis also confirmed that Darlington came into the service office in 1981 and threatened to sue him (Lewis) because of an asserted failure to assign him customer-paid work.

Concluding Findings

Although the discharge of DeLeon and the quitting of his employment by Darlington are interrelated, they are separate events which must be considered on their own merits. Turning first to the discharge, Respondent in effect argues: (1) that DeLeon was not engaged in protected activity in protesting about the service clinic and working late on Wednesday evenings; and (2) that even if his conduct were considered to be protected group activity, it was unrelated to the reasons for his discharge since he would have been terminated even in the absence of such protected activity. The initial question to be resolved here is whether DeLeon was engaged in activity protected by the Act when he protested against working the service clinic without receiving compensation and working late hours on Wednesday evenings. In my judgment, this question must be answered in the affirmative.

It is evident from the undisputed testimony that the mechanics as a group were concerned about working the service clinic without receiving any wages. Indeed, Lewis testified that when he first met with the mechanics in September[33] to inform them of the clinic, DeLeon and Juliano wanted to know if the mechanics would be paid for working the clinic. When Lewis met with the mechanics the second time to inform them that management would not pay for their services at the clinic, DeLeon urged the employees to stick together in order to force management to compensate them.[34] In these circumstances, it can hardly be said that DeLeon was pressing a complaint which was peculiar or personal to him alone. Rather, he was complaining and urging action on a matter which was of common concern to all the line mechanics. Activity of this nature is clearly concerted and falls within the protection of Section 7 of the Act. *Pace Motor Lines, Inc.*, 260 NLRB 1395 (1982); *Timet, A Division of Titanium Metals Corporation of America*, 251 NLRB 1180 (1980) (and the cases cited therein).

Similarly, when management decided that the mechanics would have to alternate working late hours on Wednesday evenings, DeLeon, along with other mechanics, complained there would not be enough work to justify staying late 1 night a week.[35] Thus, DeLeon's complaints about working late on Wednesday evenings also involved a matter of common concern to the mechanics as a group. As such, it too constituted protected concerted activity.

Having determined that DeLeon's conduct regarding the service clinic and the late hours on Wednesday evenings was concerted activity, the question remains as to whether his explosive outburst on December 3, when told he would have to work late, removed his conduct from the protection of the Act. I find that it did not.

When Lewis informed DeLeon that he would have to work late or find someone to substitute for him, the employee vociferously protested that it was not his turn and shouted to Lewis that "working Wednesday nights sucks." It is evident from the expression used by DeLeon that he was renewing the general complaint of the mechanics against working late on Wednesday evenings, even though he was personally affected on this particular occasion. See *Pace Motor Lines, Inc., supra* at fn. 2. As the Board has stated, misconduct during the course of protected concerted activity must be flagrant or egregious to warrant removal of the protection of the Act. *Traverse City Osteopathic Hospital*, 260 NLRB 1061 (1982); *United States Postal Service*, 250 NLRB 4 (1980); *Thor Power Tool Company*, 148 NLRB 1379, 1380 (1964).

While the use of a profane expression is not to be condoned, the undisputed testimony discloses that the use of profanity in the service department was a common occurrence. Thus, DeLeon's profane expression was not an unusual incident. The assertion by Lewis that he was fearful about customers being within hearing range is a legitimate concern, but his testimony fails to indicate that customers were actually in the mechanics' portion of the

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[33] It is abundantly clear that DeLeon was mistaken as to the month the meetings took place and when the service clinic was held. However, his testimony regarding the events is generally corroborated by other witnesses present at the meetings, including Lewis.

[34] Both Darlington and DeLeon testified that Lewis became angry at this point and stated, "There was no union in the shop." Highton, who was no longer employed by Respondent, did not mention any comment regarding a union by Lewis during his testimony and Juliano, also no longer an employee, specifically stated there was no mention of a union at the meeting. Having observed the demeanor of all the witnesses testifying to this event, I credit the testimony of Lewis that he made no reference to a union during the course of the meeting.

It should be noted at this point that the testimony of Darlington and DeLeon seemed, at times, to be exaggerated and embellished in an effort to bolster their cause. In so doing, they have made this a most difficult case in which to ascertain the reliable facts. Where I have perceived this to be the situation, I have not relied on their testimony. However, this does not mean that I have discredited their testimony in general. Rather, I have rejected those portions which are deemed to be exaggerations and accepted those portions which are deemed worthy of belief. *N.L.R.B.* v. *Universal Camera Corporation*, 179 F.2d 749, 754 (2d Cir. 1950) (opinion of Judge Learned Hand).

[35] It is significant to note, that when Farris first told Lewis in October the service department would be open late on Wednesdays, Lewis also objected on the ground that the volume of work would not justify keeping the mechanics late.

service area. On direct examination Lewis stated the customers were in the driveway of the service area and he made a mental note of this fact. However, on cross-examination Lewis admitted he had no recollection of customers being present at the time of the DeLeon outburst. Both DeLeon and Darlington (the latter being present during the discussion between Lewis and DeLeon) testified that no customers were present at the time of the outburst. Because of the vagueness of Lewis' testimony on this critical point, I find the testimony of DeLeon and Darlington to be more reliable and trustworthy. In so doing, I am not unmindful of the statements of Schiess that DeLeon slammed down the hood of the automobile in his mechanic's stall and threw a tool at his workbench. I attach no weight, however, to this testimony given by Schiess since it is clear that Lewis made no mention of this particular conduct nor did management assert this as part of the misconduct which caused it to decide to terminate DeLeon's employment. Indeed, there is no indication from the testimony of Lewis that he observed DeLeon engage in this further tantrum or that he was aware it had occurred.

On the basis of the above, I find the General Counsel has established a *prima facie* showing sufficient to support the inference that DeLeon's protected activity was a motivating factor in the decision to discharge him. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980). Under the analysis mandated by *Wright Line*, it is incumbent on Respondent to persuasively demonstrate that it would have discharged DeLeon even in the absence of the protected conduct. This I find Respondent has failed to do.

Respondent argues that the outburst on December 3 was the latest of a series of misdeeds committed by DeLeon and was in effect "the straw that broke the camel's back." Respondent points to the written reprimands received by DeLeon on July 7 (unauthorized use of a customer's vehicle to go to a fast food store) and on August 6 (parking his own vehicle on company property without permission and taking an extended lunch period). In addition, Respondent cites the fact that, on December 1, DeLeon's wife called and informed the service secretary that DeLeon would be late for work because of lack of transportation and later called to advise the secretary that DeLeon would not come in at all that day because he was ill. According to Lewis, this was a breach of shop rules for which he verbally reprimanded DeLeon, since the employee did not contact him *directly*.

The reasons advanced by Respondent to demonstrate that DeLeon would have been terminated even in the absence of his protected conduct fail to be persuasive when other contemporaneous factors are considered. Thus, after the second meeting in September when DeLeon urged the employees to stick together to compel management to pay them for working the service clinic, Lewis reported DeLeon's actions to Farris and Farris in turn called DeLeon into his office. Although Farris denied that there was any mention of a union or union organizing during this discussion, I do not credit him in this regard. While Farris was not a hesitant or uneasy witness, his denials did not carry the conviction of truth. DeLeon's testimony on this point, on the other hand, was forthright and without the embellishment that I have perceived in some portions of his statements. Therefore, I find that Farris asked DeLeon about what had been reported to him regarding the employee's complaint about working the service clinic gratis and that he also accused DeLeon of attempting to organize some type of union activity. When DeLeon replied that if a union were in the shop the employees would be paid for working the clinic, Farris sought to denigrate the value of unions by pointing out that unions were causing the Kaiser Steel Company to fail. I further find that Farris warned DeLeon that management did not "want any of that union stuff" and, if the employee wanted to be represented by a union, he should work elsewhere.

That Farris and Respondent's other supervisors viewed DeLeon's activities as a precursor of a possible union organizing effort, even though no union was on the scene at the time, is further evidenced by Farris' conversation with Darlington in November when the employee was protesting his failure to receive the Mechanic of the Month award. I credit Darlington's testimony that Farris complained that DeLeon made himself a "mouthpiece" for the mechanics regarding the service clinic and that he did not need that "damn Willy." Further manifestation of Respondent's fear that DeLeon would eventually organize the employees for some collective purpose was demonstrated by the comments made by Lewis on several occasions in referring to DeLeon in the service department. Although Lewis denied calling DeLeon the "shop steward," I do not credit him in this regard. Rather, I find that his reference to DeLeon in this fashion was consistent with the fear expressed by management that DeLeon's protests over working the service clinic and the late hours on Wednesday evenings, and his urging the mechanics to stick together, would ultimately result in an effort to cause the employees to seek to become unionized. These fears were further reflected in Lewis' conversation in February 1981 with Highton. Although Lewis again denied that he told Highton that Farris considered DeLeon a troublemaker who should be fired because he would organize a union, I do not credit this denial. It was evident that during this conversation Lewis was attempting to discourage Highton from supporting the Union, which at that time had commenced its organizing effort, and the comments attributed to him were consistent with management's attitude toward DeLeon.

A further indication that Respondent considered DeLeon a troublemaker who might organize the employees into some type of collective action through unionization is found in comments made by Lewis at the time he discharged the employee. DeLeon testified that Lewis said he could not take it any more and that DeLeon had been creating problems between Lewis and the other mechanics. Here again, Lewis denied making these statements, but I find the denial does not carry the ring of truth. It is significant to note that Flinchbaugh, the service secretary, was present in the service office and only a few feet away at the time the conversation took place. However, she testified only as to DeLeon's comments and professed that she did not hear anything said by

Lewis. The improbability of Flinchbaugh failing to hear the entire conversation, because of her proximity to DeLeon and Lewis, causes me to infer that, if she had been willing to give a complete and accurate account of what took place, her testimony would have corroborated that of DeLeon. I find, therefore, that the explanation given to DeLeon as to why he was being terminated clearly implied that Lewis was taking this action because the employee had engaged in conduct which has been found here to be protected by the Act and, further, that Lewis feared that a continuation of such conduct would result in an effort to unionize the employees.

Finally, the fact that Respondent sought to include the matter of the phone calls by DeLeon's wife on December 1, when DeLeon did not report to work, as an example of the employee's past violations of shop rules further demonstrates the contrived nature of the justification advanced by Respondent for the decision to discharge the employee. It is evident that the messages from DeLeon's wife, first that the employee would be delayed and subsequently that he would not come to work at all, were delivered directly to Lewis by the service secretary. Yet, Lewis asserted that this violated Respondent's shop rules because the employee failed to notify him personally. Since the purpose of the rule was to cause the mechanics to notify management in order to permit them to schedule the flow of work, it can be hardly said in these circumstances that the calls from DeLeon's wife failed to satisfy the requirement. Nonetheless, Respondent advances this as evidence of DeLeon's further failure to abide by the shop rules.[36]

In the totality of the circumstances here, I find that Respondent has failed to demonstrate that DeLeon's discharge would have occurred in the absence of his protected conduct. Thus, I find Respondent has failed to persuasively rebut the *prima facie* showing by the General Counsel that DeLeon's protected activity was a "motivating factor" in the decision to discharge him. *American Tool & Engineering Co., Inc.*, 257 NLRB 608 (1981). Since I have found that the conduct engaged in by DeLeon did not lose its protected character at the time of the explosive outburst on December 3, I further find that Respondent violated Section 8(a)(1) of the Act when it discharged DeLeon. *Traverse City Osteopathic Hospital, supra.*

Turning to the events which occurred after the discharge of DeLeon, I find that the record evidence and the credited testimony establish that Respondent committed several further violations of the Act. First, it is undisputed that, after DeLeon's organizing effort on behalf of the Union following his discharge, Farris called the mechanics into his office and questioned them about the reasons why they wanted a union. Farris told the employees he was hurt because they were seeking union representation and asked if money was a factor in their decision to unionize. It was in response to this questioning that Darlington stated he wanted someone between him and management.

While it is evident from the testimony that Farris did not make any threats of reprisals or promises of reward to the employees during this meeting, I am constrained to find, under current Board law, that the interrogation was coercive becsause it "[conveyed] an employer's displeasure with employees' union activity and thereby [discouraged] such activity in the future." *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146, 1147 (1980). See also *Gosen Company, a Division of the United States Gypsum Company*, 254 NLRB 339 (1981). Accordingly, I find the interrogation of the employees by Farris regarding their reasons for supporting the Union to be a violation of Section 8(a)(1) of the Act.[37]

On the other hand, the statements made by Lewis to Highton in January 1981 are fraught with coercive threats, the intent of which was to cause the employee to abandon his support for the Union. While Lewis denied making the statements attributed to him by Highton, as indicated in the discussion regarding the discharge of DeLeon, I do not find his denials to be worthy of belief. Lewis admitted talking to Highton "because [he] wanted to be certain the employee was aware of what he was getting involved with" by supporting the Union's organizing effort. This explanation is hardly persuasive since it is evident that the purpose of Lewis' discussion was to induce Highton to abandon his support for the Union. Thus, I credit the testimony of Highton and find that Lewis told him: that Ellis would close the dealership; that Ellis was rich and powerful and could cause bodily harm to befall DeLeon; that when DeLeon was urging the employees to stick together in dealing with management, Farris thought he should be fired because he might attempt to organize a union in the service department; that any employee suspected of organizing on behalf of the Union could anticipate being terminated; that job applicants would be screened regarding their union sentiments; and that if Highton persisted in his support of the Union, Lewis would be powerless to prevent management from taking reprisals against him.

That such blatant threats contravene the statutory protection provided by the Act is without question and warrants no citation. Accordingly, I find that, in making these coercive statements to Highton to induce the employee to abandon his support for the Union, Respondent, through Lewis, violated Section 8(a)(1) of the Act.

The events which occurred with Darlington after the commencement of the union activity in mid-December 1980 embody further violations of the Act. My conclusions in this regard are based on a number of factors which the record evidence demonstrates to be unsatisfactorily explained by Respondent.

At the outset, it is immediately evident that Darlington was the most productive mechanic in the service department for the months of September, October, and November 1980. Yet, the number of hours he "flagged" dropped dramatically from mid-December until the time he quit on the morning of May 1, 1981. In the absence of some credible explanation it is highly improbable that the most

[36] Indeed, Respondent's argument would be more persuasive if it had complained about DeLeon's failure to report to work that day rather than the manner in which it was notified.

[37] The General Counsel amended the complaint at the hearing to allege this conduct to be violative of the Act.

productive mechanic in the service department would suddenly become the least productive. In addition, this substantial drop in his work output lends credence to his complaint that he was given less lucrative work to do and that work was being withheld deliberately from him in the service office. Indeed, as the General Counsel points out in her brief, the decline and short spurts of increase in the amount of work flagged by Darlington tracked his involvement in union activities and management's efforts to persuade him to abandon the Union.

The exhibits in evidence (G.C. Exh. 6(a–f)) and the summary made therefrom by the General Counsel in her brief reveal that, after management received the letter from the Union naming certain employees as members of the in-plant committee, the amount of work flagged by Darlington for the next two pay periods dropped sustantially.[38] In sharp contrast, the records show that Schiess, who sought the advice of management in requesting return of his authorization card from the Union, experienced a dramatic increase in the number of hours he flagged. In mid-January Payne, admittedly antiunion, was hired and thereafter proceeded to flag the greatest number of hours of any of the mechanics in the shop. Although there was a brief upsurge in the number of hours for Darlington during the next two pay periods (mid-January to mid-February), the records show that he was never able to come close to the total hours flagged by Payne nor even close to the number of hours he was able to achieve during the months of September through November 1980. Thereafter, Darlington's hours decreased almost consistently in contrast to the number of hours recorded for Payne and Schiess. Thus, the record themselves tend to indicate a correlation between Darlington's union activities and the amount of work he was given to perform in shop.

Respondent's contention that Darlington repeatedly refused work assignments is not convincing when all the record evidence is considered. Other than to state generally that Darlington refused work assignments "every two or three days," neither Payne nor Schiess could state with specificity the times when Darlington was alleged to have refused job assignments. Burroughs, the service adviser, testified initially that Darlington refused job assignments at least 5 to 10 times. When closely questioned on cross-examination, however, she could only point to a refusal in January 1981 when Darlington initially refused to work on the Lowe vehicle because Schiess was the mechanic who had originally performed work on the automobile. This testimony regarding Darlington's asserted refusal to accept jobs assigned to him is belied by the events which occurred after his initial refusal to work on the Lowe vehicle. Lewis promulgated a shop rule which made any refusal of work assigned to a mechanic "grounds for reprimand and/or dismissals." (See Resp. Exh. 7.) It stretches the imagination to believe that Respondent would have condoned repeated refusals by Darlington to accept work assigned to him over a 4-month period without taking any type of disciplinary action against the employee. This is especially true in light of the specific shop rule put into effect by Lewis in January and which resulted in Darlington's written reprimand for the refusal to work on the Lowe vehicle. The testimony of Burroughs, Payne, and Schiess also flies in the face of the undisputed testimony that, in March, Darlington complained to Lewis about not receiving work and threatened to sue Lewis personally.[39]

Moreover, I note at this point the conflict between the testimony of Burroughs and Lewis regarding the job assignment procedure. Burroughs asserted that Lewis made the assignments most of the time and she did so only when he was not available. Lewis, on the other hand, testified he only assigned work to the mechanics about 5 percent of the time and that Burroughs made the bulk of the assignments. Since no useful purpose could be served by disclaiming responsibility for the job assignments, I find that each was seeking to avoid being held accountable for the failure to make assignments to Darlington.

On the basis of the above, I find that Respondent, through Lewis or pursuant to instructions from Lewis, was deliberately withholding work assignments from Darlington in order to discourage the employee from engaging in activity on behalf of the Union. This explains the sudden fall in the work hours recorded by Darlington (and the other union supporters) while the hours of the employees opposing unionization increased. It also serves to lend credence to the conversations Darlington had with Lewis regarding his union activities.[40]

On February 4, Darlington had an extended conversation with Lewis in which his union activity was the primary subject. This conversation took place 2 days after Darlington made the assertion to Patterson and Lewis that an ignition screw had been removed deliberately, because of his union activities, from an automobile on which he worked.[41] Lewis told Darlington that there

[38] At this juncture, it is important to note that the number of hours flagged by Highton and Galbaldon (the other union adherents) also dropped, though less substantially, after receipt of the letter from the Union identifying them as supporters.

[39] Respondent contends that Darlington threatened to sue Lewis because he wanted to receive more "customer-paid" work. I find it unnecessary to determine whether Darlington's threat was motivated by an attempt to get more work generally or more customer-paid work. It is evident that his complaint related to either the failure to get work or the failure to receive his share of the more lucrative work; in either event, the withholding of such work from the employee because he was involved in union activities would be discriminatory.

[40] The complaint alleges and Darlington testified that Patterson, Sr., the used car manager, spoke with Darlington in the parking lot in mid-January. Darlington asserted that Patterson told him to get out of the Union because every employee who stayed in it would be fired. Patterson denied having any such conversation with Darlington. This is one of the instances in which I find that Darlington was embellishing and adding on to his testimony. I do not make this finding lightly but deem it significant that Darlington, having filed a series of charges against Respondent with the Board, failed to note this particular conversation in any of the four affidavits he gave the Board to support his charges. I find it highly unlikely that Darlington would have overlooked such a critical threat from a member of management when he first filed his charges and gave sworn statements to support them. Accordingly, I credit the testimony of Patterson and find that the General Counsel has failed to come forward with any credible evidence to support this allegation of the complaint.

[41] This was the first of two attempts by Darlington to assert that his work was being sabotaged in retaliation for his union activities. Since it is extremely unlikely that Respondent, or anyone at Respondent's behest, would sabotage a customer's vehicle and thereby expose itself to monetary liability and damages for endangering the lives of customers, I find

Continued

was no way Respondent would allow the Union to become the representative of the employees. He indicated that Ellis would transfer the title to the dealership and close the doors for a few months before he would permit this to occur. He also told Darlington that Respondent would hire additional mechanics and thereby dilute the amount of earnings the mechanics would receive. When Darlington asked why Lewis was singling him out since Schiess was also a supporter of the Union, Lewis informed Darlington that Schiess had sent a letter asking the Union for the return of his authorization card. It was at this point that Lewis told Darlington if he did the same, "everything would be okay." It was also during the course of this conversation that Lewis sought to impress upon Darlington, as he had with Highton, the fact that Ellis had influence and wealth and that it was possible for him to cause physical harm to DeLeon. Lewis further indicated that Respondent was prepared to test the "fine" by discharging some employee and that employee might very well be Darlington. He also suggested to Darlington that, if he asked for the return of his card from the Union, Highton would do likewise.[42]

Approximately a week later Lewis and Darlington were in an automobile and Lewis asked Darlington what he had decided to do. It was at this point that Darlington expressed distrust of Farris and Lewis sought to assure the employee that nothing would happen to him. It is apparent, therefore, that when Darlington failed to ask for the return of his authorization card and abandoned his support for the Union, his job assignments and his earnings continued to decline steadily to the point where he found it intolerable and decided to quit.

In sum, I find that on the basis of the above that Lewis engaged in retaliation against Darlington because of his union activities by withholding job assignments so as to affect the employee's earnings in the shop. I further find that, when Darlington complained, Lewis made it clear to the employee that if he were to abandon the Union and request the return of his authorization card, his lot would improve. In addition, I find that in order to make certain the employee understood Respondent would not tolerate unionization of the employees in the service department, Lewis voiced coercive threats that Respondent would close the dealership, would dilute the earnings of the employees by hiring additional help, and would hire someone to cause bodily harm to the former employee who was attempting to organize the shop. Such conduct clearly violates Section 8(a)(1) of the Act. I further find that, by withholding job assignments from Darlington because of his union activities, Respondent radically altered the employee's working conditions and so affected his earnings that he was forced to resign his employment. See *Association of Apartment Owners of the Whaler on Kaanapali Beach*, 255 NLRB 127 (1981); *Boyles Galvanizing Company*, 239 NLRB 530 (1978); *Crystal Princeton Refining Company*, 222 NLRB 1068 (1976). In so doing, Respondent caused the constructive discharge of Darlington in violation of Section 8(a)(3) of the Act.

the propensity of Darlington to attempt to avoid responsibility for faulty workmanship by characterizing it as retaliation for his union activities to be inexcusable. Nevertheless, I do not find that this flaw in his character affected the reliability of his testimony regarding the events which caused him to quit his employment.

[42] Although Lewis denied making any of the above statements to Darlington, I discredit him for the reasons cited previously herein.

CONCLUSIONS OF LAW

1. Respondent, Bilmax, Inc., d/b/a Ellis Toyota, is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. General Truck Drivers, Warehousemen & Helpers Union Local 467, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging employee Guillermo DeLeon for engaging in protected concerted activity in protesting against working service clinics without compensation and against working late hours on Wednesday evenings, Respondent has interfered with employee rights guaranteed by Section 7 and violated Section 8(a)(1) of the Act.

4. By coercively interrogating employees about their union sympathies and desires, Respondent has violated Section 8(a)(1) of the Act.

5. By threatening to close the dealership, reduce employees' earnings by hiring additional mechanics, screen new employees as to their union sentiments, cause bodily harm to a discharged employee for attempting to organize a union, and discharge employees that supported unionization, Respondent has committed violations of Section 8(a)(1) of the Act.

6. By promising an employee that, if he requested the return of his union authorization card and abandoned his support for the Union, his job assignments and earnings would be restored to their former levels, Respondent has violated Section 8(a)(1) of the Act.

7. By reducing the number of jobs assigned to employee Larry Darlington because of his union activities and thereby causing reduction in his earnings, Respondent adversely affected the employee's working conditions to such a extent that he quit his employment. In so doing, Respondent has violated Section 8(a)(3) and (1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, it shall be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Since it is determined here that Respondent unlawfully discharged Guillermo DeLeon for engaging in protected concerted activity and caused the constructive discharge of Larry Darlington because of his union activities, it shall be recommended that these two employees be offered immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority

or other rights and privileges. In addition, Respondent shall be ordered to make whole these employees for any loss of earnings they may have suffered due to the discrimination against them. Since the unit employees were paid by commission based on the type of job assigned to them, determination of the loss of earnings shall be left to the compliance stage of the proceedings. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[43]

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[44]

The Respondent, Bilmax, Inc., d/b/a Ellis Toyota, Colton, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees for engaging in protected concerted activity guaranteed employees by Section 7 of the Act.

(b) Coercively interrogating employees about their union sympathies and desires.

(c) Threatening employees in the following manner:

1. Telling employees Respondent will close its dealership if the Union becomes their representative.

2. That employees earnings will be reduced by hiring additional mechanics.

3. That new employees will be screened as to their union sentiments.

4. That Respondent will cause bodily harm to befall a discharged employee because of his efforts to organize a union.

5. That employees who support the Union will be discharged.

(d) Promising employees that if they ask for the return of their union card and abandon their support of the Union their job assignments and earnings will be restored to their former levels.

(e) Discriminatorily reducing the job assignments and earnings of employees because of their union activities so as to adversely affect their working conditions in order to cause them to quit their employment.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Guillermo DeLeon and Larry Darlington immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed. In addition, make them whole, in the manner set forth in the section of this Decision entitled "The Remedy," for any loss of earnings they may have suffered by reasons of the discrimination against them.

(b) Expunge and remove from its records and files any reference to the termination of DeLeon and the constructive discharge of Darlington. Respondent shall write a letter to each of these employees informing him that it has complied with this provision and that its unlawful conduct will not be used as basis for future personnel action against him.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility located in Colton, California, copies of the attached notice marked "Appendix."[45] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the allegations contained in the amended complaint not specifically found to be violations are hereby dismissed.

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[43] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[44] In the event no exceptions are filed as provided in Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[45] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."